Supreme Court, U.S.
FILED
SEP 13 2010
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170 (3)

No. 09-1485

In The
Supreme Court of the United States

AMERICAN ROAD & TRANSPORTATION BUILDERS ASS'N,
PETITIONER,

v.

ENVIRONMENTAL PROTECTION AGENCY, *ET AL.*,
RESPONDENTS.

On Petition for Writ of *Certiorari* to the U.S. Court of Appeals for the District of Columbia Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF *CERTIORARI*

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PETITIONER'S REPLY BRIEF

The American Road & Transportation Builders Association ("ARTBA") respectfully replies to the opposition brief filed by the Environmental Protection Agency ("EPA").

RESTATEMENT OF THE CASE

The First Amendment proscribes laws "abridging ... the right ... to petition the government for a redress of grievances." U.S. CONST. amend. I. Article III limits federal courts to actual or imminent "cases" and "controversies." *Id.* art. III, §2. Nothing limits Congress or delegated agencies to actual or imminent issues.

Although this litigation ultimately concerns preemption under Clean Air Act ("CAA") §209(e), 42 U.S.C. §7543(e), the jurisdictional issues turn primarily on Administrative Procedure Act ("APA") §4(e)'s relation to CAA §307(b) for judicial review of EPA denials of administrative petitions for rule revisions. 5 U.S.C. §553(e); 42 U.S.C. §7607(b).

EPA cannot dispute that APA §4(e) predated §307(b) with review distinct from CAA's 1970 review. *Olijato Chapter, Navajo Tribe v. Train*, 515 F.2d 654, 667 (D.C. Cir. 1975). EPA also cannot dispute that "[s]ubsequent statute[s] may not be held to ... modify [APA review] except to the extent that [they] do[] so expressly." 5 U.S.C. §559. Instead, EPA argues that CAA's 1977 amendments "directly focused" on and revised §307(b), compelling different results.

The 1970 version expressly rejected tying renewed review to after-arising "information," selecting instead after-arising "grounds." Pet. at 19 n.7, 32. The courts of appeals that reached the "grounds" issue construed it as petition denial, as

distinct from the arising of post-promulgation "information." *Navajo Tribe*, 515 F.2d at 667; *Union Elec. Co. v. EPA*, 515 F.2d 206, 220 (8th Cir. 1975). There is no contrary authority.

The 1977 amendments require petitions for review "based solely on grounds arising after such sixtieth day" to "be filed within sixty days after such grounds arise." 42 U.S.C. §7607(b)(1). Congress rejected *dicta* from *Investment Co. Inst. v. Bd. of Governors, Fed'l Reserve Sys.*, 551 F.2d 1270, 1280-81 (D.C. Cir. 1977) ("*Investment Co.*") to allow petition-reopener review after initial promulgations for "legitimate excuse[s]," without rejecting the *holding* that the petitioner-reopener doctrine applied when ripeness prevented timely challenge. S. REP. 95-294, 322 (1977). The 1977 amendments expressly ratified *Navajo Tribe*, H.R. REP. 94-1175, 264 (1976); S. REP. 95-294, at 323, by requiring presentment of after-arising issues to EPA before petitioning for review. 42 U.S.C. §7607(d)(7)(B).

Although §307(b)'s jurisdictional dispute will drive the Court's decision, ARTBA highlights EPA misstatements on §209(e)'s underlying merits:

1. Citing *Engine Mfrs. Ass'n v. EPA*, 88 F.3d 1075, 1094 (D.C. Cir. 1996) ("*EMA*"), EPA argues that §209(e) preempts "standards" and "'implementation and enforcement' provision[s]" relating to emissions controls. EPA Br. at 2-3. In trebly broad language, §209(e) preempts "*any* standard *or other* requirement *relating to* the control of emissions." 42 U.S.C. §7543(e)(1). EPA prevailed in *EMA* against only manufacturers, not those affected by in-use controls; with only the incomplete, non-locomotive portion of §209(e) before the court; and with no imminent in-use controls on anyone.

Nonetheless, *EMA* held EPA's interpretation *unsatisfactory* and upheld it only because the manufacturers failed to harmonize the statute. *EMA*, 88 F.3d at 1087, 1094. ARTBA now offers additional arguments – some available in 1994, some not – to harmonize the statute.

2. EPA defines "new" as not yet in service. EPA Br. at 3. Although the *EMA* parties squabbled to define new, 88 F.3d at 1084-87, new-vehicle preemption extends throughout vehicles' federally regulated "useful life." 42 U.S.C. §7521(a)(1). In-use standards or other requirements applicable during that period are "not consistent with [§7521(a)]" and thus preempted. 42 U.S.C. §§7543(b)(1)(C), (e)(2)(A)(iii); *cf. Engine Mfrs. Ass'n v. South Coast Air Quality Management Dist.*, 541 U.S. 246, 259 (2004) (reserving question of in-use preemption).

3. EPA admits that its rulemaking considered "criteria for EPA's consideration in authorizing California ... standards applicable to [small nonroad] engines" under the "Bond Amendment." EPA Br. at 9 n.3. Because the Bond Amendment directly undercuts limiting "any ... other requirement" to mere enforcement and implementation provisions, *compare* Pet. at 27 *with EMA*, 88 F.3d at 1093, ARTBA deserves a hearing.

4. EPA suggests that ARTBA's petition merely "[r]ais[es] a number of arguments that the D.C. Circuit previously rejected in *EMA*," EPA Br. at 4, without acknowledging that ARTBA raised critical issues not raised (much less rejected) there. *First*, the Bond Amendment undermines *EMA*. *Second*, EPA's subsequent locomotive rules undermine *EMA*. *Third*, preemption continues to protect vehicles during their federally regulated useful life, rather

than evaporating – as EPA argued – once vehicles leave the showroom floor. *Fourth*, even if CAA §213(d) imports in-use preemption into §209(e) – as EPA argued – the importation extends only as far as §213(d): to new vehicles (*i.e.*, §209(e)'s in-use authority preposterously extends only to vehicles on showroom floors). 42 U.S.C. §7547(d).

REASONS TO GRANT THE WRIT

I. §307(b) AND ALL WRITS ACT PROVIDE REVIEW

Both §307(b)(1) and the All Writs Act provide jurisdiction for review.

A. §307(b) Provides Review

Although EPA does not dispute that §307(b)(1) cannot bar reviewing previously unripe claims, EPA disputes the *procedure* for reviewing them. EPA Br. at 11-16. EPA argues principally that §307(b)(1)'s 1977 amendments render *Navajo Tribe* irrelevant because Congress "directly focused on the issue" and rejected the petition-reopener doctrine. EPA Br. at 11-12. EPA's arguments distort the applicable statutory text, legislative history, and canons of statutory construction.

The 1970 amendments rejected triggering review on after-arising "information" and chose after-arising "grounds." Pet. at 19 n.7, 32. Without changing that, the 1977 amendments required presenting after-arising issues to EPA *before* petitioning for review. 42 U.S.C. §7607(d)(7)(B). Extra-record information or events provide no "grounds" for overturning EPA action. Instead, EPA's arbitrary, capricious, or otherwise unlawful action or inaction – *once presented with the information or events* – constitutes the "grounds" for

reversing EPA. *Id.* §7607(d)(9)(A). EPA's proffered "linchpin" (EPA Br. at 14) is nothing of the sort.

The legislative history plainly supports ARTBA. Congress rejected only the *dictum* from *Investment Co.*, S. REP. 95-294, at 322, and expressly adopted *Navajo Tribe*. *Id.* at 323; H.R. REP. 94-1175, at 264. EPA simply quotes history out of context.

Even if §307's statutory text was not plain and its history was not clear, EPA's reading still flounders: Congress would not repeal petition-reopener review by implication. Pet. at 20-21. As ARTBA explained, that presumption is especially strong for judicial remedies generally and the APA particularly. *Id.* Given the APA overlay, EPA cannot claim deference.

1. Previously Unripe Claims Not Barred by §307(b)(1)

Mischaracterizing ARTBA's position, EPA claims without citation that ARTBA "contended below that the later-arising 'grounds' were the ripening of its claims." EPA Br. at 13. ARTBA argues that §307(b) neither statutorily confers ripeness to allow reviewing all EPA promulgations within 60 days, nor statutorily denies review for claims that ripen after 60 days. The former exceeds Article III, and the latter the Due-Process Clause.

2. Pre-Suit Petition Required for Time-Barred Claims

Without apparent irony, EPA suggests that ARTBA "does not appear to contend that the EPA decision itself is a 'ground[] arising' after the original 60-day window." EPA Br. at 15 (EPA's alteration). That is *precisely* what ARTBA contends, Pet. at 20-23, as well as the petitioner-reopener doctrine's

entire point. *Id.* at 18 (citing cases); *Union Elec.*, 515 F.2d at 220 (petition for reviews timely "only when [EPA] fails to act upon ... new information presented" via administrative petition). If there was any doubt, it was ARTBA's first question presented. Pet. at i. It even has crept into treatises on the CAA. 61B AM. JUR. 2D Pollution Control §646. As EPA notes, the panel held that EPA's petition denial "doesn't count" for purposes of §307(b)(1)'s 60-day clock, EPA Br. at 15 (*quoting* App. 10a), but the panel at least recognized that that was ARTBA's argument.

CAA does not provide another means to review post-promulgation issues (*e.g.*, Bond Amendment, inconsistent treatment of locomotives). 42 U.S.C. §7607(d)(7)(B). Consistent with *Navajo Tribe*, after-arising "grounds" necessarily entail denial of administrative petitions because such petitions are the only mechanism for presenting after-arising "information" or "events" for EPA's consideration. Without such administrative petitions, the extra-record information or events would be unreviewable. *Id.* EPA's contrary argument is baffling.

EPA suggests that §307(b) may require administratively petitioning EPA within 60 days of some external event. EPA Br. at 13. Under its plain language, §307(b)(1) requires a "petition for review" within 60 days of after-arising grounds, 42 U.S.C. §7607(b)(1), which means petitioning a court. Indeed, the First Amendment and APA §4(e) independently authorize petitioning EPA, and neither Article III nor §307(b) place any limit on those rights. Because ARTBA did not need subject-matter jurisdiction or §307(b) to petition EPA, the suggestion that §307(b)

requires petitioning administratively within 60 days *after* some event is nonsense.

ARTBA filed its administrative petition proactively in 2002 to avoid another episode like its Texas litigation, where Texas promulgated plainly preempted rules that EPA's interpretations purport to authorize. Nothing prohibits filing administrative petitions proactively, *before* triggering events. Having petitioned EPA, ARTBA was bound to await EPA's final action before commencing litigation by §307(b)(1), §307(d)(7)(B), and administrative exhaustion. *Navajo Tribe*, 515 F.2d at 667 (§307(b)(1)); *Union Elec.*, 515 F.2d at 220 (same); *Davis v. Ball Memorial Hosp. Ass'n*, 753 F.2d 1410, 1412 (7th Cir. 1985) (exhaustion); *Brown v. Secretary of Health & Human Services*, 46 F.3d 102, 113-14 (1st Cir. 1995) (same, collecting cases); *Kappelmann v. Delta Air Lines*, 539 F.2d 165, 169, 171 (D.C. Cir. 1976) (primary jurisdiction).

3. Panel Deviates from Settled Precedent

Without discussion or citations, EPA flatly denies that the panel conflicts with *Navajo Tribe* or other decisions. EPA Br. at 11. With *Navajo Tribe* swept aside, EPA crowns *Nat'l Mining Ass'n v. Dep't of Interior*, 70 F.3d 1345 (D.C. Cir. 1995), "the D.C. Circuit's established framework," requiring petitioning "within 60 days after some identified new event." EPA Br. at 12. *Navajo Tribe* reached an opposite result under similar statutory text, Pet. at 23, as have several circuits. *Id.* (collecting cases). EPA offers only a flat denial.

B. All Writs Act Provides Review

ARTBA raised the All Writs Act, which provides review, even if §307(b) does not.

1. ARTBA Raised All Writs Act

EPA argues that ARTBA's appellate brief raised the All Writs Act only in its jurisdictional statement, thereby waiving the issue. EPA Br. at 17. EPA is wrong, factually and legally.

Factually, ARTBA cited the All Writs Act as a jurisdictional basis, Appellate Opening Br. at 1, cited injuries from *future* State Implementation Plan ("SIP") litigation outside the D.C. Circuit, *id.* at 24-32, and classified overlapping, extra-circuit SIP litigation as irreparable harm, *id.* at 44-45. Future litigation outside the D.C. Circuit is precisely the non-nationwide application of CAA preemption that §307(b) should avoid and that the All Writs Act prevents. Moreover, ARTBA based a significant portion of its petition for reconsideration on review under the All Writs Act. Appellate Pet. for Reconsideration at 7-8 & n.8, 13-14, 15. The D.C. Circuit's failure to address the All Writs Act is error, not ARTBA's fault.

Legally, it would not matter if ARTBA had not raised the All Writs Act. *First,* if "jurisdiction ... actually exists," plaintiffs (or petitioners) can cite that jurisdiction for the first time on appeal. *Newman-Green, Inc. v. Alfonzo-Larrain,* 490 U.S. 826, 831 (1989); 28 U.S.C. §1653. *Second,* subject-matter jurisdiction does not require specific citations where the "facts alleged and the claim asserted ... were sufficient to demonstrate [jurisdiction's] existence." *Schlesinger v. Councilman,* 420 U.S. 738, 745 (1975). *Third,* failure to raise jurisdictional

arguments does not waive those arguments. *Sochor v. Florida*, 504 U.S. 527, 534 n.* (1992). Even if ARTBA had not raised the All Writs Act below, ARTBA could raise it here.

2. All Writs Act Protects Prospective Jurisdiction

EPA argues that All Writs Act jurisdiction depends on underlying subject-matter jurisdiction, EPA Br. at 17 (*citing U.S. v. Denedo*, 129 S. Ct. 2213, 2221 (2009)), and that courts should not prefer other statutes' broad review over specific review provisions like §307(b). *Id.* at 18 (*citing Califano v. Sanders*, 430 U.S. 99, 108 (1977) *and Whitney Nat. Bank v. Bank of New Orleans & Trust Co.*, 379 U.S. 411, 422 (1965)). EPA's cursory defense is a *non sequitur*.

To ensure nationwide uniformity, Congress vested the D.C. Circuit with exclusive subject-matter jurisdiction over nationally applicable CAA rules. Pet. at 15, 33. By accident or design, EPA's preemption rules have circumvented the D.C. Circuit through insufficient clarity for other circuits to apply uniformly.[1] The All Writs Act provides jurisdiction to preserve the D.C. Circuit's future jurisdiction to address §209(c) uniformly under §307(b)(1). Pet. at 24. Nothing in *Denedo* conflicts with that. Indeed, *Denedo* concurs in that.

Neither *Sanders* nor *Whitney Nat'l Bank* prohibit ARTBA's invoking the All Writs Act to

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[1] The SIP-related litigation over San Joaquin fleet rules (Pet. at 33) circumvents the D.C. Circuit for the Ninth Circuit.

preserve §307(b)'s exclusive jurisdiction in the D.C. Circuit's for nationally applicable rules. ARTBA does not invoke "review under another statute" at all. Instead, ARTBA invokes the All Writs Act *to preserve* §307(b)'s intended review.

II. RE-PROMULGATION REOPENS REVIEW

EPA admits reopening its preemption rules to address the Bond Amendment, but denies it for ARTBA's petition. EPA Br. at 8-9 & n.3. EPA's admission renders its denial nugatory. EPA continued to interpret "other requirements" narrowly, notwithstanding the Bond Amendment's undermining that interpretation. *Compare* Pet. at 27 *with EMA*, 88 F.3d at 1093. That is "plain-vanilla" judicial review under §307(b)(1).

EPA makes no effort no rebut ARTBA's demonstration that no court of appeals has limited review in the manner that EPA proposes: namely, to deny review when agencies republish regulatory text and explain their rationale for not changing that text. Pet. at 26. This Court should not allow extending the agency-goading rationale to cases where agencies propose to adopt the challenged text.

III. ISSUE PRECLUSION REQUIRES REOPENER

Prior ARTBA-EPA litigation estops EPA's denying now what EPA argued in 2007: EPA's notice of proposed rulemaking ("NPRM") reopened EPA's rules. Pet. at 28-29. EPA simply reiterates that its NPRM did not propose *anything* on ARTBA's petition. EPA Br. at 10. In 2007, ARTBA agreed, App. 113a, but in 2007 the D.C. Circuit held that the NPRM mooted ARTBA's prior action because, as

EPA argued, "EPA has now commenced a rulemaking on the issues ARTBA raised." App. 109a.

EPA now claims that it merely *pledged* to consider whether to reopen the rules. EPA Br. at 10. EPA does not respond to ARTBA's argument that merely providing such notice of administrative petitions does not moot unreasonable-delay claims. Pet. at 29. EPA also sought dismissal of ARTBA's prior action based on §307(b)(1)'s 60-day limit. By denying relief on that fully briefed issue and dismissing for NPRM-based mootness, the prior panel necessarily found jurisdiction under §307(b)(1) for petition-denial claims under the All Writs Act. *Sierra Club v. Thomas*, 828 F.2d 783, 792-96 (D.C. Cir. 1987). Only if the D.C. Circuit had future jurisdiction to preserve could the NPRM moot the prior ARTBA-EPA action. Because "subject-matter jurisdiction ... may not be attacked collaterally," *Kontrick v. Ryan*, 540 U.S. 443, 455, n.9 (2004); *Travelers Indem. Co. v. Bailey*, 129 S.Ct. 2195, 2205-06 & n.6 (2009), EPA cannot now deny subject-matter jurisdiction.

IV. EARLIER DECISIONS CONTROL INTRA-CIRCUIT SPLITS

Not content to question the relevance of *Navajo Tribe*, EPA goes even further – and too far – to argue that, even if *Navajo Tribe* would control as the first-decided case in an intra-circuit split, this Court has no place policing the D.C. Circuit's "internal difficulties." EPA Br. at 16-17 (*quoting Wisniewski v. U.S.*, 353 U.S. 901, 902 (1957)). EPA simply misunderstands *Wisniewski*.

Wisniewski held that appellate panels cannot certify questions to this Court whenever they

disagree with holdings from prior panels of the same court. *Wisniewski*, 353 U.S. at 902. Without sanctioning intra-circuit conflicts, that merely recognizes courts of appeals' authority, *in the first instance*, to address intra-circuit conflicts.

This Court has assumed that prior panels bind subsequent panels on several occasions. *See, e.g., Jones v. Bock*, 549 U.S. 199, 220 n.9 (2007); *Textile Mills Securities Corp. v. Commissioner*, 314 U.S. 326, 335 (1943). This Court has *held* that the courts of appeals may adopt "[a]ny procedure ... which is sensibly calculated to achieve these dominant ends of avoiding or resolving intra-circuit conflicts." *Western Pacific R. Corp. v. Western Pacific R. Co.*, 345 U.S. 247, 271 (1941). But the Court has never held that the courts of appeals may simply ignore intra-circuit conflicts.

Courts of appeals have multiple options to resolve intra-circuit splits. *See, e.g.*, 28 U.S.C. §46(c); *Irons v. Diamond*, 670 F.2d 265, 268 n.11 (D.C. Cir. 1981); *Dickinson v. Petroleum Conversion Corp.*, 338 U.S. 507, 508 (1950). Typically, circuits ignore later-decided panel decisions, Pet. at 31 (collecting cases), which the D.C. Circuit adopted *en banc*. *LaShawn v. Barry*, 87 F.3d 1389, 1393 (D.C. Cir. 1996) (*en banc*). The panel here lacked authority to prefer *National Mining* over *Navajo Tribe*.

EPA notes that no judge requested a vote on rehearing *en banc*. EPA Br. at 17. Having failed to ratify the panel's deviation from binding precedent in any available manner, the full D.C. Circuit abdicated its authority to address intra-circuit splits in the first instance. Under *Western Pacific*, 345 U.S. at 260 (interior quotations omitted), this case now falls under this Court's "general power to supervise the

administration of justice in the federal courts," and "the responsibility lies with this Court to define [the] requirements and insure their observance."

On this issue, the only question is whether *National Mining* conflicts with *Navajo Tribe*. If so, the panel erred by not rejecting *National Mining* once ARTBA cited *Navajo Tribe*.

V. CAA REVIEW IS IMPORTANT

Without disputing *CAA's* importance, EPA calls *this case* unimportant, even if wrongly decided. EPA Br. at 8, 11. To sanction EPA's resolutions of ARTBA's principled challenge to EPA's flawed preemption rules provides a roadmap for foot-dragging agencies, contrary to APA's expeditious, generous review. *Shaughnessy v. Pedreiro*, 349 U.S. 48, 51 (1955); 5 U.S.C. §555(e). Agencies could ignore petitions until sued for delay, then moot that litigation after briefing it, all by pledging today to decide eventually whether to consider issues someday.

CONCLUSION

The Court should grant the writ of *certiorari*.

September 13, 2010

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